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Supreme Court of the United States

OCTOBER TERM, 1965.

No. 119

UNITED STATES OF AMERICA,
Appellant

versus

NEW ORLEANS CHAPTER, ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC., ET AL.,
Appellees

On Appeal from the United States District Court for the Eastern District of Louisiana, New Orleans Division

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PETITION FOR REHEARING

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Francis G. Weller

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Joseph J. Smith, Jr.

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PETITION FOR REHEARING

Appellees present their petition for a rehearing of the above entitled cause, and, in support thereof, respectfully show:

GROUNDS FOR REHEARING

The Court, in its per curiam opinion reversing the District Court's dismissal of the indictment against appellees, cited only *Times Picayune Publishing Co. v. United States*, 345 U.S. 594, at 623-624, and *United States v. Socony Vacuum Oil Co., Inc.*, 310 U.S. 150, at 226.

If these cases are cited as authority for the proposition that the government, under appropriate circumstances, cannot be precluded from criminal prosecution by the acts of its officials, then they are in clear conflict with the more recent decision of this Court in *Cox v. Louisiana*, 379 U.S. 559 (1965), cited and discussed in appellees' Motion to Dismiss or Affirm.

If *Cox* is distinguishable in principle from these two cases on the basis of the particular facts and circumstances involved, such a distinction buttresses appellees' Motion to Dismiss or Affirm in the present case.

In *Socony Vacuum*, the defendants claimed only to have the approval of spokesmen for an administrative agency. Here, the business practice alleged to be objectionable had the apparent sanction of the Department of Justice itself—that very arm of the Executive branch charged with enforcing the laws.[1]

Further, *Socony Vacuum* was a price fixing combination. This was illegal *per se*, said the Court, so the conduct of the defendants could not be evaluated in terms of purpose, aim or effect in the elimination of what was thought to be competitive evils.[2]

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[1] The incongruity of an enforcement agency seeking to penalize conduct to which it has given it approbation is emphasized by the Federal Trade Commission's dismissal of charges in *Arnold Constable Corp.*, 55 FTC 577 (1958), in which the accused had relied on the advice of a commission bureau chief:

> "The Commission being of the opinion that while the foregoing does not constitute a defense to any unlawful activity in which the respondent may have engaged, principles of equity and ordinary fair dealing do militate against the further prosecution of the complaint insofar as it charged the respondent with the use of fictitious pricing claims. . ."

[2] *United States v. Socony Vacuum Oil Co., Inc., supra*, at 228.

These *are* relevant considerations in the present case, in which the indictment was dismissed not because the Department of Justice acquiesced in a furtive *per se* violation of the anti-trust laws, but because the Department tacitly approved a business custom, i.e., the single contract bid system, which was defined, published and pursued for all of the world to see.

Likewise, in *Times-Picayune,* the Court noted only that a delay in prosecution invokes no prescriptive rights in favor of trade agreements.[3] But here is not merely a trade agreement between private businesses. In the instant case there is apparent sanction by that very arm of government which now seeks to penalize conduct it led defendants into believing was inoffensive.

Moreover, the Court in *Times-Picayune* noted that competitive business considerations are "not wholly irrelevant" in evaluating the conduct of persons charged with anti-trust violations. This distinction in measuring activity charged as offensive under the anti-trust laws, in contrast with offenses *malum in se* proscribed by the laws relating to crimes, was pointed out in *People v. Ferguson,* 134 Cal. App. 41, 24 P2d 965 (1933), cited by this Court in *Cox* and quoted in appellees' Motion to Dismiss or Affirm.[4]

CONCLUSION

The two cases cited by the Court in its reversal of the District Court's judgment are either in conflict with this

[3] *Times Picayune v. United States, supra,* at 623-624.
[4] Motion to Dismiss or Affirm, p. 5.

Court's current decision in *Cox*, or the principle upon which they can be distinguished from *Cox* supports appellees' Motion to Dismiss or Affirm. In any event the conflict requires clarification by the Court.

Respectfully submitted,

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CERTIFICATE

I, R. Emmett Kerrigan, counsel for the above named petitioners, do hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay.

New Orleans, Louisiana, this 1st day of Nov., 1965.

/s/
R. EMMETT KERRIGAN